Supreme Court, U.S.
FILED
FEB 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1184

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE BROOKLYN UNION GAS COMPANY,

Petitioner,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Respondent,

and

THE CITY OF NEW YORK,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF OF PETITIONER

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February 27, 1986

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ARGUMENT

The replies by the State Board of Equalization and Assessment and by The City of New York ignore the public interest here and petitioner's position that due process of law required a ruling on the merits of its RCNLD evidence by the courts below.

I. The issue here impacts millions of people and the availability of judicial remedies in New York.

The issue here is not one of a local tax proceeding or of an issue involving only a mass of factual material (City Br. at 13). It is a question of whether four million gas users, a large percentage living at the poverty level, and the company that serves them are entitled to have a hearing on whether their gas bills were burdened by illegal taxes because of SBEA over-valuation.

The New York State Public Service Commission advised our Court of Appeals of the public interest in this case, noting that the taxes at issue here "represent a significant portion of utility consumers' gas . . . bills." The Public Service Commission told the court of its policy to flow large tax refunds through to utility ratepayers. It noted also that ratepayers would "continue to benefit from a ruling requiring tax refunds [by] . . . lower future utility bills. There is no question, therefore, that Brooklyn Union's ratepayers would benefit from an affirmance of the Appellate Division's decision." (P.S.C. *Amicus* Brief to Court of Appeals at 6, 7).

Under the guise of arguing that no important question exists, the City, but not the SBEA, proffers the incredible argument that the "SBEA itself has described every element of the valuation process in its exhaustive compendium of Rules."[1] (City Brief at 12). The trial court lamented that it was "totally in the dark upon the central issue it is required to decide, i.e., 'whether the SBEA assessment method was correct in form and application'." (Appendix at 23a). Nowhere does the City tell this Court that there were no Rules when these assessments were made and none when this case was tried. Only in December 1983 when review was pending before the Appellate Division did SBEA

[1] This "exhaustive compendium" fails to disclose, for example, the basis for discrimination that was discosed by an SBEA supervisor in testimony at a separate subsequent special franchise trial. There he acknowledged that during years from 1975 to 1980 other gas distribution companies in New York, some with mains in the same streets, received depreciation treatment that was 33 1/3% to 66 2/3% greater than that accorded to Brooklyn Union. The witness could offer no factual or physical reason for the vast difference and he acknowledged that no engineering analyses were performed. *Brooklyn Union v. SBEA* (1975/76-79/80 tax years) Transcript of Trial before Hon. DeForest Pitt at V.XIII, 1274-75, 1287-88, 1314. This absurd and punitive result could not be explained by a senior SBEA official and under no conceivable circumstances could these "Rules" at 9 N.Y.C.R.R., Part 197.3 have reflected SBEA practices.

adopt Rules. These so-called Rules are not "the equivalent of a text book on the subject" (City Brief at 12); these Rules were an after-the-fact act of SBEA and they are even now under legal challenge by others.

As a separate and significant consideration, if Brooklyn Union can not obtain review of its assessments even when it has followed established procedural rules and presented evidence under the Court of Appeals RCNLD theory, that may signal to lower courts and to practitioners a judicial fiat that legal options no longer exist. Hereafter, in the absence of corrective action by this Court, one coming to New York courts may be at peril in offering alternative evidentiary presentations even if one of them is the correct approach.

II. Petitioner asks only to have its case heard on the merits.

The SBEA begins its opposing brief by references to Amendment V and to Amendment XIV. Both are urged by Brooklyn Union here as a legal basis to support its position that the dismissal on rehearing by the Court of Appeals was constitutionally infirm once that court had been told that it had ignored Brooklyn Union's RCNLD appraisal. In most simple terms, Brooklyn Union's RCNLD evidence was not ruled upon by any of the courts of New York State even though it is the very legal basis which the Court of Appeals has told us is the law of valuation in New York State.[2] The SBEA never offered an appraisal. It

[2] The Court of Appeals decision suggests that reproduction cost new less depreciation (RCNLD) has been the approved method of valuation in this State for many years. However, the last decided case on the valuation of special franchise (utility) property to pass through our courts did so more than a quarter of a century ago and there the SBEA itself used original cost, not RCNLD as a basis of valuing utility property. *Staten Island Edison Corp. v. Moore,* 6 A.D.2d 369, 177 N.Y.S.2d 129 (3d Dep't 1958), *reversing,* 6 Misc. 2d 1031, 164 N.Y.S.2d 772 (Sup. Ct. Albany County, 1955), *aff'd after remand,* 15 A.D.2d 983, 225 N.Y.S.2d 520 (3d Dep't), *aff'd,* 12 N.Y.2d 846, 236 N.Y.S.2d 624

(footnote continued on following page)

presented no witness. It had no Rules. The court was provided no evidence of the SBEA's appraisal process. To this day we have not one shred of evidence on what valuation method the SBEA followed here. Brooklyn Union was entitled to such a ruling because it was the *only* party in the case to offer the required RCNLD evidence. It presented all known alternative valuation theories at trial. The trial judge never reached the RCNLD evidence; he reached his decision without commenting on petitioner's RCNLD valuation or weighing it or in any way utilizing it.

The intermediate appellate court, the Appellate Division, reviewed this case and unanimously affirmed the trial judge. It had the entire record to review but found no reason or basis for considering Brooklyn Union's RCNLD evidence and it did not. It too concluded that the only opposing expert, Mr. Emery, lacked qualifications as an expert. The Appellate Division is our highest fact-finding court.

The City and State Board have argued that New York's highest court, the Court of Appeals, gave full consideration to Brooklyn Union's RCNLD appraisal. As that court is not a fact-finding court, one wonders how it could have done so. The Court of Appeals has never acknowledged that Brooklyn Union had submitted a RCNLD appraisal.

The Court of Appeals has declared its interpretation of the law of special franchise valuation. In so doing, that court has simply ignored that Brooklyn Union presented a case in full compliance with that interpertation. No court has considered Brooklyn Union's RCNLD case. No court

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(*footnote continued from preceding page*)

(1962). Only four years ago the Court of Appeals in a companion special franchise certiorari proceeding declined to advise Brooklyn Union that RCNLD was the "long accepted rule." *Consolidated Edison Co. v. SBEA*, 58 N.Y.2d 710, 458 N.Y.S.2d 967 (1982).

has rejected Brooklyn Union's RCNLD case. No court has received any credible opposing RCNLD evidence. It should be abundantly clear that until Brooklyn Union's RCNLD case has been heard and ruled upon, Brooklyn Union and its four million consumers have been deprived of their rights to due process under Amendment V and Amendment XIV of the Constitution.

The Question Presented as stated by the City response does not resemble the grievance pressed by the petitioner. The City has ignored the basic due process issues presented and it questions, not the existence, but the quality, of petitioner's RCNLD evidence. The City attacks the quality of RCNLD evidence with accusations that it "deviated significantly from the method customarily denoted RCNLD" (City Brief at 3) or that it was "a thinly disguised version intended to bolster its 'capitalization method'." (City Brief at 7). The City suggests that Brooklyn Union decries "the lack of a line-by-line critique of its valuation solecisms . . . by the Court of Appeals itself." (City Brief at 9). It says there is no requirement that a court "educate a party, least of all with respect to questions of fact." (City Brief at 9). We agree that our highest court has no obligation to educate on the facts. Brooklyn Union only asks that a New York court evaluate its RCNLD evidence. Its contention is that not one of the three courts below ever looked at or ruled on the merits of its RCNLD evidence.

Because of an error of law, the trial judge and the Appellate Division found overvaluation on the wrong legal theory. Both of those courts looked at but one of the two factual presentations which petitioner had made. They had no need to review or rule on the RCNLD since it was not essential to their conclusion that the property had been substantially overassessed. Both courts did look at, and rejected, the City's and the SBEA's only evidence. That RCNLD testimony and appraisal was rejected because

of lack of qualification of the expert and fatal flaws in his appraisal report.

Neither court ever made any use of petitioner's RCNLD evidence. They did not reject it, they did not approve it, they did not evaluate it. Both fact-finding courts ignored it: the trial court because it chose a legal theory amply supported by other evidence; the Appellate Division because it affirmed on the same erroneous legal theory. The trial judge never once mentioned Brooklyn Union's RCNLD appraisal. The Appellate Division never discussed its existence. The Court of Appeals has never acknowledged that petitioner's evidence included a full RCNLD appraisal.

In New York, the lower courts have the duty to make findings of fact and conclusions of law. Our highest court deals with law alone. Thus, when the Court of Appeals said that RCNLD applies to this property it was obliged to consider the entire record and recognize that the petitioner had provided detailed RCNLD appraisal evidence and was entitled to a ruling on the merits of that case.

Until the Court of Appeals was advised that this evidence had never been considered, there may not have been a consitutional issue.[3] When it was advised that evidence on its own approved theory was offered but not considered—then the right to be heard arose and its denial of that right was a constitutional deprivation. There is no question that Brooklyn Union had the opportunity to offer its evidence at trial. The problem is that its RCNLD evidence was never considered and ruled upon by any New York court.

Both SBEA and the City briefs take pains to obscure this fact by discussing the opportunity which petitioner had in

[3] In the companion *National Fuel* case, 65 N.Y.2d 472, 492 N.Y.S.2d 598 (1985), the trial court had weighed RCNLD evidence and held *against* that different petitioner. Here, since the lower courts found for petitioner on a separate theory, they never considered its RCNLD evidence.

these proceedings to present evidence. Yet even the SBEA brief acknowledges openly that "the RCNLD evidence of appraisal offered by petitioner [was] not considered by the courts below." (SBEA Brief at 6). That is exactly why the petitioner has been denied its right to be heard.

This is not a case where "insufficient consideration was given to certain elements of the evidence and testimony received and heard;" (City Brief at 8) the SBEA admits that Brooklyn Union's RCNLD appraisal was not considered at all. Consideration of petitioner's RCNLD evidence was not necessary or warranted until the Court of Appeals reversed the two lower courts on the law. At that point, the RCNLD evidence and testimony, until then an unweighed alternative, demanded judicial consideration by the New York courts.

CONCLUSION

For the reasons stated in the Petition and in this Reply, Brooklyn Union asks to be heard by this Court.

Respectfully submitted,

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